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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 410

OVE GUSTAVSSON CONTRACTING COMPANY, INC.,

Petitioner,

against

FRANKLIN G. FLOETE, Administrator of General Services Administration and MICHAEL BRENNAN, Contracting Officer, and Chief, Design and Construction Division, Public Buildings Service, General Services Administration,

Respondents.

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

Statement

The principal reason for this reply is that respondents' entire argument as to why this petition should be denied is based upon a statement of fact which is not so, that is, that this action is for damages for a breach of contract against the United States for more than $10,000.00.

Argument

The respondents (p. 5 of their brief) refer to petitioner's suit as one for damages as aforesaid. They rely upon the decision of the Court of Appeals as authority for this

statement. Though that may be the legal fact, objectively, that fact is not so. Actually, it is the complaint itself which should control. Its allegations determine the nature of the complaint. Every fair intendment that may be read from the complaint should be read in favor of the pleader. The only place in the complaint where the thought of a money judgment is alluded to is in the prayer for relief at paragraph 5, as modified by sub-paragraphs (a), (b) and (c). This prayer may not be as explicit and plain as it should have been, yet this paragraph can and should be interpreted as asking for a judicial review of the offending agency action. That it would be repetitious of the relief requested in paragraph 1 of the prayer would not go against this interpretation. Analysing said paragraphs (a), (b) and (c) shows that plaintiff's objective was to implement the declaration that Brennan's action be held null and void as requested in paragraph 1, by directing Brennan to approve for payment such amounts as may be ascertained by the court as due the plaintiff, if the court's equitable conscience had to resort to an assessment of damages, to do equity, if the injunction would not have met the ends of justice. It must be kept in mind that Brennan is the contracting officer and the one who must approve for payment, any part performance of the contract by the plaintiff. The foregoing implementation is authorized by Section 10, subdivisions (b) and (e) of the Act which provide that the courts may compel agency action unlawfully withheld.

5 U.S.C.A., Sections 1009(b) and (e).

Furthermore, a prayer for relief is not the controlling element in the determination of the nature of the pleading. The allegations themselves are. The allegations in this complaint state the decision of the contracting officer, Brennan, cancelling the contract is arbitrary, capricious and beyond his authority, that plaintiff had appealed such

decision to the head of the department and its right to complete the contract during such appeal was unlawfully refused in violation of the contract terms.' Wherefore, it demanded that Brennan's decisions be nullified; that plaintiff be allowed to continue the work pending said appeal, that defendants be restrained from reletting the contract to others and upon a declaration of the unlawfulness of Brennan's action to assess damages if that should be necessary and to direct Brennan to approve them for payment. Thus, it would appear that a judicial review would follow from the allegations made and that that was plaintiff's objective rather than a money judgment against the United States for a breach of contract.

The rule appears to be that when more than one interpretation may be accorded to a pleading, the courts will adopt that interpretation which favors the pleader.

> *Friedericksen v. Renard*, 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075.

If it is concluded that plaintiff's complaint seeks a review, then this leads to the issue before the court, viz., may plaintiff seek a judicial review of Brennan's decision. The Court of Appeals has avoided this issue: first, by calling plaintiff's action a contract action to recover a sum of money from the United States and then, by saying that the existence of such a cause of action (a breach of contract action) deprives the plaintiff of a judicial review by reason of the provisions of Section 10(c) of the Act. The Court of Appeals actually equated the proceeding for a judicial review with a breach of contract action. This obviously was erroneous because the plaintiff here seeks the enforcement of rights, and only incidentally does it seek a direction for the payment of a sum of money. The demand for the enforcement of its rights invoked the equitable jurisdiction of the court below. Hence, it cannot be said that this action is similar to the action that can

be brought in the Court of Claims. The fact that during the pendency of this action, the defendants had relet the contract to others who had completed the work would not deprive the District Courts of the equitable jurisdiction it had in this case. If the reletting was unlawful, then the equitable conscience of the court would do justice by providing a substitute for the requested performance, namely, a grant of a decree ascertaining the fair and reasonable value of the performance of the contract by the plaintiff and a direction to Brennan that he approve the same for payment. Proof of this difference in the causes of action demonstrates the error made by the Court of Appeals. The provision in Section 10(c) defining acts which are reviewable as those "for which there is no other adequate remedy in any court" could not deprive this petitioner of a judicial review because petitioner had no such "other adequate remedy" in the Court of Claims.

Moreover, such provision of Section 10(c) was intended to apply to the finality of the act subject to the review and not to say that a judicial review may not be had if there is a cause of action for a breach of contract in the Court of Claims. This specific provision has never been before this court except perhaps in the immigration cases cited in the petition where this court considered the Government's argument that a habeas corpus proceeding was available to the petitioner and for that reason the immigrant was not entitled to a judicial review. While this court does not mention this part of Section 10(c) in its decisions in those cases, yet the court refused to say that the concurrent remedy of habeas corpus was exclusive of a judicial review. The court said that habeas corpus was not an adequate substitute for a judicial review. It felt that the right to a judicial review should not be denied the petitioner, because it was a more efficacious remedy than the habeas corpus proceedings. A similar comparison to this case would readily show that a judicial review of the Brennan decision in the local

courts would have provided the plaintiff with a quick, decisive decision and if found in favor of the plaintiff, it would have enabled the plaintiff to proceed with the contract, thus saving everyone a great deal of money and affording much needed judicial economy. As it is, the decision would deny a right of review to every contractor who would be aggrieved by a contracting officer's decision acting beyond the scope of his authority. This would be discriminatory. It would deny to general contractors, unquestionably, a large segment of our economy, the rights granted under the Administrative Procedure Act. The right of judicial review has been held by this court to be a right available to any aggrieved party adversely affected by agency action which is beyond the scope of the authority of the acting official.

Harmon v. *Brucker*, 355 U. S. 579.

Therefore, such discrimination and the failure to discern the scope of this court's decisions would entitle this case to be brought up for review by this court.

This issue also involves the second portion of Section 10(c) of the Act, stating that an agency action shall be final and subject to review, despite the existence of machinery for an appeal to the head of the department, when the decision complained of is not in the meantime rendered inoperative. The plaintiff did timely appeal to the head of the department from Brennan's decision. Yet, despite such appeal, Brennan's decision was not rendered inoperative. Therefore, it read Brennan's decision as final as defined in this second part of Section 10(c). The Court of Appeals, however, by again relying upon its erroneous equating of a judicial review with a breach of contract action that could be brought in the Court of Claims stated that the appeal to the head of the department is a prerequisite to the bringing of the suit. This is obviously erroneous, not only because the equating is not justifiable but also, because

it flies in the face of the second part of Section 10(c). Such second part of Section 10(c) has never before been considered by this court. The Court of Appeals was obviously incorrect in failing to apply the definition of finality to the facts of this case.

It is respectfully submitted that this phase of the matter also calls for a review by this court.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.